BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEVIN M. GILBERTSON	)	
Claimant	)	
VS.	)	
	)	
KANSAS NATIONAL GUARD	)	Docket No. 1,063,787
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Fund	)	

ORDER

Claimant appealed the October 28, 2013, Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on February 11, 2014.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for claimant. Collin G. Hildebrand of Great Bend, Kansas, appeared for respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

The Award provides:

> Claimant suffered personal injury by accident, as a result of repetitive trauma, causing him to develop bilateral carpal tunnel syndrome. The bilateral carpal tunnel syndrome was caused by the repetitive and long-term use of hand tools in performing his regular duties. The development of carpal tunnel syndrome thus arose out of and in the course of his employment. Claimant suffered a 5% impairment of function to each upper extremity for residuals of his surgically-addressed carpal tunnel syndrome. Claimant failed, however, to make a timely

> written claim for compensation, and is limited to the medical and temporary total disability benefits previously received.[1]

The ALJ also states:

> If the court's analysis is correct, and Claimant failed to make a timely written claim for compensation, Claimant is not entitled to any further treatment. If the court's analysis is rejected by a reviewing body, and Claimant is found to be entitled to additional benefits, Claimant will be entitled to future medical upon proper application.[2]

Claimant contends he made timely written claim and requests an award of compensation based upon a 10% functional impairment to the right upper extremity and a 5% functional impairment to the left upper extremity.

Respondent requests the Board affirm the ALJ's finding that claimant failed to provide timely written claim. If this claim is compensable, respondent asserts claimant has a 5% right upper extremity functional impairment for carpal tunnel syndrome, no left upper extremity functional impairment and is not entitled to future medical treatment.

The issues before the Board on this appeal are:

1. Was timely written claim provided?

2. If so, what is the nature and extent of claimant's disability?

3. Is claimant entitled to future medical benefits?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

At oral argument, the parties agreed the only issues before the Board are timely written claim, nature and extent of claimant's disability, and whether claimant is entitled to future medical benefits. A discussion of claimant's series of repetitive accidents culminating on April 27, 2011, is unnecessary and the Board incorporates by reference herein the first three paragraphs of the Award's Findings of Fact.

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[1] ALJ Award at 12.

[2] *Id.*

Claimant indicated he saw his family physician, Dr. James Shafer, on March 2, 2011, and the doctor indicated claimant's symptoms might be work related. After the appointment with Dr. Shafer, claimant talked to his supervisor, Ivan Woltje, and filled out an accident report. The accident report completed by claimant was not placed in the record at the regular hearing. Claimant testified:

> Q. And you filled out an accident report. Why did you fill out an accident report?
>
> A. So I could claim this under workman's compensation.
>
> Q. And when you say you claimed it as a workers' compensation, what was your expectation as you filled out the accident report?
>
> A. I wanted to see if it was related to my job duties and see a doctor.
>
> Q. Okay. Did you have an expectation when you filled out the accident report as to who would pay for the doctor's report -- or the doctor's treatment?
>
> A. No, I assumed it was under workman's compensation.
>
> Q. Okay. So did they, in fact, send you to a doctor?
>
> A. Yes.[3]

Claimant was referred by respondent to Occupational Health Partners, where a nerve conduction test was recommended. The test was performed by Dr. Kossow on March 21, 2011. After the nerve conduction test, claimant was referred to Dr. Bradley C. Daily, an orthopedic surgeon. Dr. Daily first saw claimant on April 6, 2011, and diagnosed him with bilateral carpal tunnel syndrome, severe on the right, mild on the left, and recommended surgery. Dr. Daily performed bilateral carpal tunnel releases on April 28, 2011. Claimant testified he did not work for approximately two weeks prior to his bilateral carpal tunnel surgery. He testified that after surgery he was off work around 45 days and then returned to his regular job duties. Dr. Daily released claimant to full duty on June 8, 2011. The last time Dr. Daily saw claimant was for a follow-up visit on July 20, 2011.

Claimant indicated that during the aforementioned 45-day period, he received a call from Scott Kollin, an adjustor with the State Self-Insurance Fund. Mr. Kollin indicated he would send some paperwork for claimant to complete, sign and return. Claimant testified he was told by Mr. Kollin the paperwork needed to be signed, in order for claimant to receive workers compensation. Claimant indicated he received the paperwork about a week after the surgery, signed it and sent it back the same day. However, he did not remember what the paperwork concerned. Claimant indicated he then began receiving temporary total disability benefits.

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[3] R.H. Trans. at 16.

At Mr. Kollin's deposition, a typewritten Employer's Report of Accident was made an exhibit. The Employer's Report of Accident indicates it was completed by Mr. Woltje/Kay L. Noel and claimant injured his wrists and elbows from repetitively hammering and using wrenches on March 3, 2011. Mr. Kollin agreed that the Employer's Report of Accident has the date of accident, the details of the accident and the individual injured.

Mr. Kollin testified he became claimant's adjustor on April 22, 2011. Mr. Kollin indicated the State Self-Insurance Fund uses a software program called Riskmaster to process workers compensation claims. All notes concerning a claim are kept on Riskmaster. The first note in claimant's file on Riskmaster indicated that on March 4, 2011, a notification letter was sent by the State Self-Insurance Fund to claimant. A copy of the actual notification letter sent to claimant was not produced, but a blank form letter was made an exhibit. The form letter includes a place for claimant's name and address and the date of injury. Mr. Kollin testified the notification letter was sent in response to receiving the Employer's Report of Accident. He indicated notification letters are sent out by the clerical staff and he had never looked at one. Mr. Kollin testified:

> Q. Right. And not to belabor the point, but would you agree with me the letter is premised on the idea that you're aware that the claimant wants to pursue this through work comp, have his bill paid for through work comp, and this sets out the procedures to do that?
>
> A. Well, anybody that submits an accident report is either doing so because their employer said to submit one whether or not they are seeking medical treatment like in an incident only report, or it's because somebody wants us to pay for their medical care --
>
> Q. And this letter --
>
> A. -- which means that they sought medical treatment.[4]
>
> . . .
>
> Q. But you would not have sent that letter out unless the adjuster was aware that a claim for compensation was being made? A request that medical bills be paid for an on-the-job injury, correct?
>
> A. Well, yeah, the -- the -- the letter is -- only goes out when we receive an accident report. And, yes, the accident report certainly will tell us that there's been an injury; and people, you know, file one when they want to have work comp pick up their medical bills or if they are required to even if -- if they're not seeking medical treatment.[5]

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[4] Kollin Depo. at 13.

[5] *Id.* at 14.

Mr. Kollin testified that a March 7, 2011, entry on Riskmaster indicated a prior adjustor took a statement from claimant, which was reduced to print. During the statement, claimant indicated his repetitive work activities at respondent contributed to his injuries and he sought medical treatment with the workers compensation doctor, OHP, on March 3, 2011. The same day, Riskmaster notes indicated the previous adjustor contacted Mr. Woltje about the claim.

At Mr. Kollin's deposition, a letter was placed into evidence dated April 6, 2011, from Orthopaedic Clinic of Salina (Dr. Daily) to claimant telling him that if he planned to have the medical bill for the bilateral carpal tunnel releases paid by respondent's workers compensation policy, he must obtain approval from the insurance company. Mr. Kollin agreed a copy of the letter was forwarded to and received by the State Self-Insurance Fund. The April 6, 2011, letter attached to Mr. Kollin's deposition includes on it: "Corvel Scan Date: 4/22/2011."[6] Mr. Kollin testified Corvel processes all the medical bills for the State Self-Insurance Fund. On April 18, 2011, Dr. Daily's office called the State Self-Insurance Fund and requested authorization for claimant's carpal tunnel release. Mr. Kollin interpreted the request as the doctor calling to see if the State Self-Insurance Fund would pay for the surgery. Mr. Kollin acknowledged the request was entered on Riskmaster and constituted a writing. Mr. Kollin also acknowledged preparing an action report on May 2, 2011, indicating claimant had been off work since April 22, 2011, and that Mr. Kollin authorized temporary total disability benefits on May 2, 2011.

On January 20, 2012, Dr. Daily, in a letter to Mr. Kollin, indicated claimant had a 5% right upper extremity functional impairment and a 0% left upper extremity functional impairment with complete resolution of symptoms. The doctor testified his functional impairment ratings were based upon the *Guides*.[7] He also testified that if a 0% is not attainable for a successful carpal tunnel release, then 1% is appropriate. Dr. Daily testified he found no stenosing tenosynovitis when he examined claimant. The doctor indicated symptoms of stenosing tenosynovitis likely would not have developed after claimant's last visit with Dr. Daily on July 20, 2011, absent a new injury. Dr. Daily acknowledged that when he measured claimant's range of motion, he did not use a goniometer. Nor did he measure claimant's grip strength per Tables 31 and 32 of the *Guides*.

At the request of claimant's attorney, Dr. Lynn D. Ketchum evaluated claimant on March 14, 2013. Dr. Ketchum's diagnoses were bilateral carpal tunnel syndrome and stenosing tenosynovitis. The doctor's report noted claimant indicated the bilateral carpal tunnel releases successfully eliminated numbness and tingling, but claimant continued to have pain in both hands, right worse than left, involving the distal palms and some of claimant's digits. The doctor stated, "He has pain and crepitus with motion at the A1

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[6] *Id.*, Ex. 6.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

pulleys, indicative of stenosing tenosynovitis which is appropriate for the type of work he has done for 12 years."[8] Dr. Ketchum testified that he personally witnessed the crepitus and that it is an objective finding. Dr. Ketchum testified claimant needed treatment for the stenosing tenosynovitis. The treatment recommended by Dr. Ketchum was Kenalog injections, and if that did not relieve claimant's symptoms, then surgery.

Dr. Ketchum testified claimant had some differences in two-point discrimination, which shows some residuals of the carpal tunnel syndrome. Dr. Ketchum testified that based on the *Guides*, he assigned claimant a 10% functional impairment for the right upper extremity and a 7.5% functional impairment for the left upper extremity. Dr. Ketchum explained:

> Well, I felt that his symptoms were mild and so, usually for carpal tunnel syndrome, untreated, would be 10 percent of the upper extremity for mild. And so I knocked that down to 5 and added another 5 for the three digits that had stenosing tenosynovitis on the right and 2.5 for the left.[9]

On cross-examination, Dr. Ketchum indicated he used his experience to assign claimant a 5% functional impairment to the right upper extremity and a 2.5% functional impairment to the left upper extremity for the stenosing tenosynovitis.

In his briefs to the ALJ and the Board, claimant asserts respondent's last payment of compensation was on December 28, 2011, when it made a payment to Salina Surgical Hospital or on January 5, 2012, when respondent paid Dr. Daily for a report containing claimant's impairment rating. Respondent asserted, "December 28, 2011, was the date last compensation was paid, therefore written claim should have been served upon respondent by July 15, 2012."[10] ALJ Moore found claimant failed to give timely written claim, stating:

> Here, the last payment of compensation was the payment of the Salina Surgical Hospital bill for Claimant's surgeries, on January 26, 2012. Claimant had 200 days thereafter, until August 5, 2012, to submit his written claim for compensation. Claimant's Form E-1 Application for Hearing was filed with the Division of Workers Compensation on January 9, 2013, and served upon Respondent sometime thereafter.[11]

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[8] Ketchum Depo., Ex. 2 at 2.

[9] *Id.* at 11.

[10] Respondent's Submission Letter at 2.

[11] Award at 8.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[12] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[13]

Timely Written Claim

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.[14] The same purpose or function has been ascribed to the requirement for notice found in K.S.A. 44-520.[15] Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation. In *Fitzwater*,[16] the Kansas Supreme Court described the test as follows:

> In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

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[12] K.S.A. 2010 Supp. 44-501(a).

[13] K.S.A. 2010 Supp. 44-508(g).

[14] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

[15] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[16] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

As early as 1933, the Kansas Supreme Court, in *Richardson*,[17] ruled that in order to constitute a written claim, no particular form is required and it is sufficient if it advises the employer that the injured employee is looking to it for compensation.

Ours[18] was cited in the Award and briefs of the parties. In *Ours*, the Kansas Supreme Court held: (1) whether an instrument constitutes a written claim and is timely is primarily a question of fact; (2) a written claim for compensation need not take on any particular form; (3) the written claim need not be signed by claimant; (4) in determining whether or not a written claim was in fact served on the respondent, a fact finder must examine the various writings and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind; and (5) the fact finder must determine whether claimant had in mind compensation for his injury when the various documents were prepared on his behalf, and did he intend by them to ask his employer to pay compensation?

The Award delineated five potential documents that could be considered a timely written claim and determined none of the documents constituted a written claim. Those documents are: (1) the Employer's Report of Accident and/or the accident report completed by claimant; (2) documents sent by Mr. Kollin that were signed by claimant and returned; (3) a form letter sent by the State Self-Insurance Fund to potential claimants, including claimant; (4) Riskmaster notes; and (5) Dr. Daily's request for surgical authorization.

The first document the ALJ considered, and rejected, as a written claim was claimant's accident report. The ALJ held:

> In any event, the accident report form is not in evidence. At best it is notice of a claimed accident or injury. Notice of an accident or injury does not constitute a claim for compensation. **Lawrence v. Cobler, 22 Kan. App. 2d 291, 295, 915 P.2d 157 (1996)**. Without the accident report form in evidence, the court is unable to conclude that it satisfies the statutory requirement for written claim. [Footnote: The "Employer's Report of Accident" form appended as Exhibit 1 to [Kollin's] deposition does not appear to be the accident report ostensibly completed by Claimant, as he described it. The Employer's Report of Accident is typed and indicates it was completed by "Ivan Woltje/Kay L. Noel." Nor is it clear that the court may even consider the terms of the Employer's Report of Accident. See. **K.S.A. 2010 Supp. 44-557(b)**.][19]

After carefully reviewing the record, the Board believes claimant completed an accident report on March 2, 2011, that was not placed into evidence. An Employer's Report

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[17] *Richardson v. National Refining Co.*, 136 Kan. 724, 18 P.2d 131 (1933).

[18] *Ours v. Lackey*, 213 Kan. 72, 515 P.2d 1071 (1973).

[19] ALJ Award at 9.

of Accident was completed by Mr. Woltje and/or Ms. Noel and forwarded to the State Self-Insurance Fund. The Employer's Report of Accident was made an exhibit at Mr. Kollin's deposition. At oral argument, claimant's attorney argued the report completed by claimant and the Employer's Report of Accident are one and the same. The Board disagrees and believes there were two distinct accident reports, one completed by claimant and the Employer's Report of Accident.

The Board finds the accident report completed by claimant on March 2, 2011, and given to his supervisor satisfies the requirement of a timely written claim. In *Barstow*,[20] a report of accident was completed by Barstow a few days after his accident and he submitted it to respondent's superintendent. Barstow lost his copy of the accident report. Barstow testified he was told by the superintendent he would notify respondent that claimant was making a workers compensation claim. A few days later, respondent, based on the information provided by Barstow in the accident report, completed an Employer's Report of Accident and submitted it to the Division of Workers Compensation. The Board found the record as a whole proved claimant completed an accident report which constituted a written claim for compensation. In several other cases, the Board has also found an accident report completed or signed by claimant or on claimant's behalf was a written claim.[21]

Claimant testified he filled out the accident report "[s]o I could claim this under workman's compensation."[22] The Board finds claimant's intent in completing the accident report was to seek workers compensation benefits, thus passing the test set forth by the Kansas Supreme Court in *Fitzwater*. Claimant's testimony was uncontradicted. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless it is untrustworthy.[23] There is nothing in the record to indicate claimant's testimony was untrustworthy.

The Board finds the Employer's Report of Accident is admissible, constitutes a timely written claim, is part of the record and is not excluded by K.S.A. 44-557. Respondent did not object to the Employer's Report of Accident when it was introduced at Mr. Kollin's deposition. Nor did respondent raise as an issue the admissibility of the Employer's Report of Accident in its submission letter to the ALJ.[24] K.S.A. 44-557, in part, states:

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[20] *Barstow v. A. D. Jacobson Co., Inc.*, No. 206,871, 1998 WL 100165 (Kan. WCAB Feb.17, 1998).

[21] See *Pappan v. State of Kansas*, No. 1,021,841, 2007 WL 2586165 (Kan. WCAB Aug. 22, 2007); *Smith v. U.S.D. 259*, No. 270,654, 2003 WL 22704162 (Kan. WCAB Oct. 31, 2003) and *Christenson v. Joel Fritzel Construction, Inc.*, No. 267,181, 2001 WL 1669685 (Kan. WCAB Nov. 30, 2001).

[22] R.H. Trans. at 16.

[23] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[24] Respondent, as its brief to the Board, adopted its submission letter to the ALJ.

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.
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> (b) When such accident has been reported and subsequently such person has died, a supplemental report shall be filed with the director within 28 days after receipt of knowledge of such death, stating such fact and any other facts in connection with such death or as to the dependents of such deceased employee which the director may require. Such report or reports shall not be used nor considered as evidence before the director, any administrative law judge, the board or in any court in this state.

In *Bearce*,[25] the Kansas Court of Appeals determined K.S.A. 44-557(b) is limited to cases where a claimant has died. In *Franzel*,[26] the Board cited *Bearce*, stating:

> As for the admissibility of the Employer's Report of Injury, the ALJ excluded this based upon the Court of Appeals' decision in *Bearce*. [Citation omitted.] That decision determined that such reports are excluded only when [claimants] ultimately die of their work-related injuries. The ALJ's decision to exclude the report, while citing *Bearce* is perplexing. Claimant in this action did not die. Thus, under the rationale of *Bearce*, it is admissible.

There is no requirement the written claim had to take on a particular form, be signed by claimant or prepared by claimant in order for it to serve as a written claim. As stated in *Craig*,[27] the purpose for written claim is to enable the employer to know about the injury in time to investigate it. The Employer's Report of Accident satisfied that requirement because after receiving the Employer's Report of Accident, the insurance adjustor took a statement from claimant, contacted Mr. Woltje and, after doing so, authorized medical treatment.

The Board finds that under *Ours*, the accident report completed by claimant, Employer's Report of Accident, documents signed by claimant and submitted to Mr. Kollin,

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[25] *Bearce v. United Methodist Homes*, No. 97,879, 2007 WL 4105377 (Kansas Court of Appeals unpublished opinion filed Nov. 16, 2007).

[26] *Franzel v. State of Kansas*, No. 1,049,195, 2011 WL 2185264 (Kan. WCAB May 11, 2011), *aff'd*, *Franzel v. State of Kansas*, No. 106,193, 2012 WL 603301 (Kansas Court of Appeals unpublished opinion filed Feb. 10, 2012).

[27] *Craig*, *supra*.

Riskmaster notes and Dr. Daily's request for surgical authorization, when taken together, constitute a timely written claim. Even if the Board would find the Employer's Report of Accident inadmissible, there is ample evidence claimant provided timely written claim.

Claimant, in order to receive workers compensation benefits, was required by Mr. Kollin to sign certain documents and return them to him. In *Riddle*,[28] claimant paid for prescriptions and presented the prescription receipts to his employer for payment within the 200-day statutory limit. A Board Member held the prescription receipts met the requirements of a timely written claim and noted it was claimant's intent to claim workers compensation benefits.

The injured worker in *Deshazer*[29] completed an Employer's Report of Accident and, at the request of the employer's insurance carrier, signed and returned a medical authorization. The injured worker thought the accident report form was prepared for the purpose of receiving workers compensation benefits and that by submitting it and the medical information as instructed, she had completed the requirements necessary to seek workers compensation benefits. The Board, in *Deshazer*, found claimant provided timely written claim, stating:

> Respondent argues that because the document claimant completed for respondent was an Employers Report of Accident form, the Board cannot consider it for the purpose of written claim. K.S.A. 44-557 sets forth the circumstances under which an employer is required to file a report of accident. To encourage compliance with this requirement, a report form is provided by the Division of Workers Compensation and, under certain circumstances, the Act affords an employer certain protections for statements it makes in that report. [Footnote: K.S.A. 44-557(b).] For this reason, the Employers Report of Accident form is not intended to be and should not be used as a substitute for a claim form. It is also not intended to be used in place of an internal incident report. Requesting an employee to help fill out an Employers Report of Accident form as a method of requesting workers compensation benefits is a misuse of the Division's report form. Therefore, the writings made on that form should not be protected or barred from evidence by K.S.A. 44-557(b). [Footnote: *See* Beckner v. State of Kansas, WCAB Docket No. 234,591 (August 1999).] But looking beyond the four corners of that exhibit, claimant testified to helping make a writing at the request of the owner as part of making a claim for workers compensation benefits. This was done within 200 days of her accident. Claimant's testimony in this regard is acknowledged by Mr. Eddings. This testimony, standing alone, satisfies claimant's burden even without introducing the actual document. Likewise, claimant testified to making another writing, signing the medical authorization, at the request of the insurance carrier. This was also done within 200 days of the accident. Claimant's testimony in this regard is supported by Ms. Webre.

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[28] *Riddle v. Price Gregory Pipeline*, Nos. 1,051,482 & 1,051,483, 2011 WL 1747857 (Kan. WCAB Apr. 7, 2011).

[29] *Deshazer v. Classic Floors, Inc.*, No. 241,169, 2001 WL 403288 (Kan. WCAB Mar. 8, 2001).

> This also was done by claimant with the intent to claim workers compensation benefits.

In *Traylor*,[30] the employer requested the injured worker to sign and return a medical authorization. The injured worker also completed a document known as an Associate Work Related Injury/Illness Report. Another document she completed was an Employee Incident Root Cause Analysis. The injured worker testified her intention, when she completed the accident report, was to have respondent take care of her injuries and that her signature on the medical authorization was intended for the filing of her workers compensation claim. The Board Member who decided *Traylor* concluded timely written claim had been provided.

The present claim is similar to *Deshazer* and *Traylor* in two respects. First, in all three cases, the claimant completed an accident report and indicated he or she thought the purpose of the accident report was to receive workers compensation benefits. Second, the claimant, at the request of respondent or its insurance carrier, completed or signed a document he or she thought was necessary in order to receive workers compensation benefits. Here, claimant, at the request of Mr. Kollin, signed and returned paperwork to him in order to receive temporary total disability benefits.

The Board concurs with the ALJ that, standing by itself, the form letter sent by the State Self-Insurance Fund to claimant is not a written claim. The form letter is not a request for workers compensation benefits on behalf of claimant. Rather, the form letter merely provides information regarding workers compensation.

The record contains a letter dated April 6, 2011, from Dr. Daily to claimant indicating that claimant needed to get approval from the State Self-Insurance Fund if he wanted the medical bill for the bilateral carpal tunnel releases to be paid by respondent's workers compensation policy. Mr. Kollin agreed a copy of the letter was forwarded to and received by the State Self-Insurance Fund. The April 6, 2011, letter attached to Mr. Kollin's deposition includes on it: "Corvel Scan Date: 4/22/2011."[31] Mr. Kollin testified Corvel processes all the medical bills for the State Self-Insurance Fund. The letter is a written document, timely submitted, requesting medical benefits. Consequently, the Board finds that document is a timely written claim.

In *Ours*,[32] the Kansas Supreme Court indicated a written claim may consist of several documents, stating:

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[30] *Traylor v. Dillon Companies*, Nos. 1,053,321 & 1,057,562, 2013 WL 1876341 (Kan. WCAB Apr. 15, 2013).

[31] Kollin Depo., Ex. 6.

[32] *Ours v. Lackey*, 213 Kan. 72, 81, 515 P.2d 1071 (1973).

> When the written communications resulting from the claimant's efforts to obtain workmen's compensation benefits were *prepared by the respondent* and mailed to its insurance carrier, it is readily apparent the respondent was aware of the fact that the claimant was making claim for compensation. The written nature of **these communications** [emphasis added] supplies the requirement that a written claim for compensation shall be served upon the employer.

The Board concludes the accident report completed by claimant, Employer's Report of Accident, documents signed at the request of Mr. Kollin, Riskmaster notes and Dr. Daily's letter, when considered together, meet the statutory requirements of a timely written claim. The documents were sufficient for respondent to investigate the claim. After receiving the accident report, respondent provided medical benefits. Respondent again provided medical benefits after receiving Dr. Daily's letter. Claimant received temporary total disability benefits after signing documents at Mr. Kollin's request.

Nature and Extent of Claimant's Disability

The Board adopts the legal analysis, findings and conclusions of the ALJ with respect to the nature and extent of claimant's disability and finds claimant sustained a 5% functional impairment to each upper extremity at the level of the forearm.

Future Medical Benefits

In *Parker-Rouse*,[33] the Kansas Court of Appeals stated:

> At the time of Amy's injury, the law stated that a claimant maintained a right to future medical benefits even when there was no evidence of a continuing need. See *Ferrell v. Day & Zimmerman, Inc.*, 223 Kan. 421, 423, 573 P.2d 1065 (1978); *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 983, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).
>
> Though K.S.A. 2011 Supp. 44-510h(e), enacted in 2011, predicates the right to claim future medical benefits upon a showing that "it is more probably true than not true that additional medical treatment will be necessary" after a claimant reaches maximum medical improvement, this 2011 legislative change is prospective rather than retroactive in application and does not apply to Amy's case. See *Matney v. Matney Chiropractic Clinic*, 268 Kan. 336, 339, 995 P.2d 871 (2000).

The Board finds claimant is entitled to apply for future medical benefits.

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[33] *Parker-Rouse v. Larned Healthcare Center*, No. 107,221, 2012 WL 5392155 (Kansas Court of Appeals unpublished opinion filed Nov. 2, 2012).

CONCLUSION

1. Claimant provided timely written claim.

2. Claimant sustained a 5% functional impairment to each upper extremity at the level of the forearm.

3. Claimant is entitled to pursue future medical benefits.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[34] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board reverses the October 28, 2013, Award entered by ALJ Moore. Claimant is awarded the following benefits:

Left forearm

Based upon an average weekly wage of $668.80, claimant is entitled to receive 3.43 weeks[35] of temporary total disability benefits at $445.89 per week, or $1,529.40, followed by 9.83 weeks of permanent partial disability benefits at $445.89 per week, or $4,383.10, for a 5% functional impairment to the left upper extremity at the level of the forearm, making a total award of $5,912.50. This entire award is found to be due and owing and ordered paid in one lump sum, less any amounts previously paid.

Right forearm

Based upon an average weekly wage of $668.80, claimant is entitled to receive 3.43 weeks of temporary total disability benefits at $445.89 per week, or $1,529.41, followed by 9.83 weeks of permanent partial disability benefits at $445.89 per week, or $4,383.10, for a 5% functional impairment to the right upper extremity at the level of the forearm, making a total award of $5,912.51. This entire award is found to be due and owing and ordered paid in one lump sum, less any amounts previously paid.

Claimant is entitled to payment of the authorized medical benefits.

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[34] K.S.A. 2013 Supp. 44-555c(j).

[35] Claimant received $3,058.81 in temporary total disability benefits for 6.86 weeks. Claimant is awarded 3.43 weeks of temporary total disability benefits for each upper extremity.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum.

Future medical benefits may be considered upon proper application to the Director.

Should claimant's counsel desire attorney fees be approved in this matter, she may submit that matter to the ALJ.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned respectfully agree with the result reached by the majority in the above matter on the issue of timely written claim. Several documents in this record qualify as a proper written claim under K.S.A. 44-520a. However, the ruling by the majority that the Employer's Report of Accident constitutes an admissible written claim in this matter is error.

K.S.A. 44-557(b) prohibits the use of the Employer's Report of Accident as evidence before the director, any administrative law judge, the board or in any court in this state. The undersigned acknowledge the Kansas Court of Appeals, in an unpublished opinion in *Bearce*,[36] found the statute's exclusion only applies when dealing with a claimant who has died. That ruling, based upon the language of the statute, is inaccurate. K.S.A. 44-557(b) discusses the initial accident report and a supplemental report should the claimant die. The

[36] *Bearce*, *supra*.

statute goes on to discuss "[s]uch report or **reports**" (emphasis added) as being inadmissible as evidence. In order for the holding in *Bearce* to be correct, the legislature's use of the plural "reports" would have to apply only to the supplemental report caused by the claimant's death. There would be no logical reason to require multiple reports if only the death of the claimant were involved in the prohibition. Subsection (b) of the statute discusses "[w]hen such accident has been reported" and "a supplemental report" in the sentence preceding the prohibition language. In order for the legislature's use of the plural "reports" to make sense, both the original accident report and the supplemental report must have been included in their contemplations. The use of the plural would make no sense if only pointing to the supplemental report caused by the claimant's death, unless a claimant were to discover a way to die multiple times.

The Kansas Supreme Court has held the most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009). Here, were the legislature intending to limit the application of the statute to only the supplemental report generated upon the death of a claimant, the use of the plural "reports" would be totally unnecessary. The only rational explanation for the statutory language is that the legislature intended the prohibition to apply to both the supplemental report and the original Employer's Report of Accident. The majority's use of the Employer's Report of Accident as a valid written claim document violates the prohibitions of K.S.A. 44-557(b).

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
janfisher@mcwala.com

Collin G. Hildebrand, Attorney for Respondent and its Insurance Fund
aoberle@wcrf.com

Honorable Bruce E. Moore, Administrative Law Judge